Supreme Court, U.S.
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No. 95-1984

In The

Supreme Court of the United States

October Term, 1995

PREFERRED MEAL SYSTEMS, INC.,

Petitioner,

v.

MARIE A. KALWAYTIS; PEGGY JACKSON; LYDIA T. HREBEN; SHIRLEY MUSTICH,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY TO BRIEF IN OPPOSITION

ELLIOT J. MANDEL
Counsel of Record

CARMELO GRIMALDI
KAUFMAN, NANESS, SCHNEIDER & ROSENSWEIG, P.C.
390 North Broadway
Jericho, New York 11753
(516) 681-2345
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

10 pp

QUESTION PRESENTED

When employees fail to receive the proper notice of plant closing under the Workers Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. Section 2101 *et seq.*, are they entitled to receive damages for each calendar day of the improper notice period, or only for work days within the improper notice period?

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POINT I

RESPONDENTS' REASON FOR DENYING THE WRIT ARE WITHOUT MERIT.

A. The Record Below And The Third Circuit's Opinion Clearly Preserved The "Calendar Day" Versus "Work Day" Issue.

As Respondents' Brief in Opposition concedes, "a split of authority has begun to develop on the specific issue whether under 29 U.S.C. Section 2104(a)(1)(A) the backpay liability of an employer who violates the WARN Act is calculated on the basis of all calendar days or only work days within the violation period." (Brief in Opposition p. 2).

Respondents assert, however, that the issue of "calendar day" versus "work day" was not raised in the District Court nor in the Circuit Court below and thus, should not be considered by this Court. Respondents' argument in this regard is specious and without merit.

When the District Court granted summary judgment in favor of Respondents, it relied upon, and was bound to follow as a matter of law, Third Circuit precedent as set forth in *United Steelworkers of America v. North Star Steel Co.*, 5 F.3d 39 (3d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1060 (1994). (*See* Appendix B to Petition for Certiorari, p. 22a).

Further, when the District Court considered the Petitioner's Motion for Reconsideration (Appendix C to Petition for Certiorari, pp. 32a to 56a), the District Court stated, in pertinent part:

> In *United Steelworkers v. North Star Steel Co.*, 5 F.3d 39 (3rd Cir. 1993), *cert. denied*, 114 S.Ct. 1060 (1994), the court ruled that an employer who violated WARN was required to pay damages for each calendar day within the violation period and not merely for days within the violation period that would have been the employee's regular work day.

(Petition for Certiorari, Appendix C, p. 39(a)).

Moreover, the issue of "calendar day" versus "work day" was directly raised at oral argument before the Court of Appeals. The Court of Appeals, however, declined to reconsider this issue, writing instead:

> In *United Steelworkers of America v. North Star Steel*, 5 F.3d 39, 43 (3d Cir. 1993), we concluded that "WARN uses the term 'back pay' simply as a label to describe the daily rate of damages payable." Hence, that case establishes the upper limit of damages applicable here as 60 calendar days wages. *Contra Frymire v. Ampex Corp.*, 61 F.3d 757, 771-72 (10th Cir. 1995) (damages calculated on number of working days lost during the violation period); *Carpenters Dist. Council v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1286 (5th Cir. 1994) (same).

(Petition for Certiorari, Appendix A, p. 7a).

By so doing, the Third Circuit acknowledged, as do Respondents, that a clear and obvious split of fundamental statutory interpretation had developed between the Third Circuit on one hand, and the Fifth and Tenth Circuits on the other hand.

The issue now urged for certiorari has been squarely treated by the Third Circuit in *United Steelworkers of America v. North Star Steel Company*, 5 F.3d 39 (3d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1060 (1994); relied upon by the District Court herein, and followed by the Third Circuit in this case. The issue is clearly presented, has been thoroughly argued, relied upon and decided below. It is ripe for review.

B. As This Matter Is A Question Of Statutory Construction, No Factual Record Need Be Before The Court.

Respondents seek denial of the Petition for Certiorari because of the alleged lack of a factual record as to the number of work days within the violation period regarding this matter.

As noted above, the District Court herein applied Third Circuit precedent when it found sixty (60) *calendar* days to be the appropriate measure of damages. Inasmuch as Third Circuit precedent did not permit consideration of work days vis-a-vis calendar days, the Petitioner below was not required (nor allowed) to demonstrate the number of work days within the violation period, as it would have been futile.

However, this is not a theoretical case requiring denial of the writ of certiorari. There are a certain number of work days within the sixty (60) day period in question. Should this Court grant certiorari, and thereafter determine the work days is the applicable measure of damages (as opposed to calendar days), the District Court can

adequately apply the rule as fashioned by this Court in its remand.

C. The Term "Improper Notice Period" Is The Equivalent Of "Violation Period."

Respondents' attempt to obfuscate the central issue in this matter (work day vs. calendar day) by focusing on the use of the term "Improper Notice Period" in the Question Presented (Petition for Certiorari pp. i and 11). It is submitted the term "improper notice period" is the equivalent of "violation period." It is clear from the Petition for Certiorari that the issue presented to this Court for review is the measure of damages – calendar days during the violation period or work days during the violation period. Thus, Respondents' assertion that a distinction should be made regarding work days in the "notice period" vis-a-vis the "violation period" is makeweight and wholly without merit.

POINT II

THE RECENT OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IN SAXION V. TITAN C MANUFACTURING, INC. SUPPORTS THE GRANTING OF THE WRIT OF CERTIORARI.

In support of its position that the writ should be granted, Petitioner stated in its Petition for Certiorari that

> "It is axiomatic that any federal court that will handle a WARN case in the future will undoubtedly consider whether calendar-days or work-

> days is the appropriate method for calculating damages."

(Petition for Certiorari, p. 12). On the same day the instant petition for certiorari was filed with this Honorable Court, the United States Court of Appeals for the Sixth Circuit issued its opinion in *Saxion v. Titan C Manufacturing, Inc.*, 86 F.3d 553 (6th Cir. 1996).[1]

In that case, the Sixth Circuit adopted the work day approach to the measure of damages which Petitioner advocates herein. After an exhaustive discussion of the calendar day vs. work day issue, the Court concluded that the work day method adopted by the Fifth Circuit should be utilized. 86 F.3d at 558-561.

Thus, yet another Court of Appeals has disagreed with the holding of the Third Circuit. As of this date, three Courts of Appeal have held that the work day method is to be used to calculate damages. The Court of Appeals for the Third Circuit, however, continues to adhere to the calendar day approach.[2]

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[1] Respondents failed to address or otherwise mention this case in their Brief In Opposition.

[2] As discussed in greater detail in the Petition for Writ of Certiorari, some District Courts outside the Third Circuit have also adopted the "calendar day" method of damages. *See e.g. Siniscalchi v. Shop-Rite Supermarkets, Inc.*, 903 F. Supp. 182 (D. Mass. 1995).

CONCLUSION

For all the foregoing reasons, and for those reasons set forth in its Petition For A Writ Of Certiorari, Petitioner respectfully renews its request that the writ be granted.

Respectfully submitted,

ELLIOT J. MANDEL
Counsel of Record

CARMELO GRIMALDI
KAUFMAN, NANESS,
SCHNEIDER & ROSENSWEIG, P.C.
390 North Broadway
Jericho, New York 11753
(516) 681-2345
Attorneys for Petitioner

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Jericho, New York